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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. AKIRIA CLARICE HUFF, Defendant and Appellant.	B288253 (Los Angeles County Super. Ct. No. MA072151)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed in part, remanded with directions.

Tyrone A. Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

An information filed October 4, 2017 charged appellant Akiria Clarice Huff with two counts of felony criminal threats (Pen, Code, § 422, subd. (a))[1] and alleged that appellant personally used a firearm in the commission of each offense (§ 12022.5, subd. (a)). It further alleged that appellant had been convicted of one prior serious and/or violent felony (§ 667, subd. (d)) and one prior serious felony (§ 667, subd. (a)(1)).

A jury found appellant guilty of both counts of felony criminal threats, but found the firearm allegations not true. Appellant admitted the prior strike and the prior serious felony convictions.

The court sentenced appellant to a total term of nine years, including five years for the prior serious felony, but suspended execution of the sentence and placed appellant on five years probation. Appellant timely appealed, alleging the trial court committed reversible error by denying her the opportunity to impeach the credibility of two key prosecution witnesses with evidence that one of the witnesses was on probation. Appellant also contends that remand is required for the trial court to exercise its newly-granted discretion under Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2) (SB 1393) to strike the prior serious felony enhancement. We agree remand is appropriate for the trial court to consider whether appellant's prior serious felony enhancement should be stricken. In all other respects, we affirm.

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[1] All further unspecified references are to the Penal Code.

Penal Code section 422, subdivision (a) provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment . . . ."

FACTUAL AND PROCEDURAL BACKGROUND

A. Prosecution Evidence

The Guyton family consists of mother Diane, son Andrew, teenage daughter Aleah and younger daughter Kanesha. Diane and her daughters lived in a house next to appellant Akiria Huff.

1. *Andrew Guyton*

Andrew was 28 years old at the time of trial. His family had a tense relationship with appellant and a history of conflict. The Guytons had purchased a security camera for their protection.

According to his testimony at trial, Andrew was inside his mother's house on September 6, 2017 when he observed appellant on her front lawn yelling profanities at his family, including "fucking faggots," "fucking bitches" and "retarded bitches." Aleah and Diane had just arrived home and were getting out of the car. Andrew went outside and yelled at appellant, calling her a "fucking bitch." Andrew observed appellant go inside her house and return with a small black handgun. Appellant threatened to kill Diane and her family. Andrew ushered Aleah and Diane inside the house and called 911. Both Andrew and Diane had heard that appellant was involved in a prior shooting.

Once inside the house, Andrew turned on the camera to start recording. The camera did not point directly at appellant's door, where appellant was standing when holding the gun. Because the camera had been off, there was no video footage of the incident. When the police arrived, Andrew was initially placed in handcuffs, and then released.

A recording of Andrew's 911 call was played for the jury. During the call, Andrew asked for help and reported being "scared" because "[a] neighbor is fighting with my mother." He also reported that appellant had a small black gun and had threatened to shoot them. At some point, appellant "took all her clothes off to fight" and was wearing only green boxers and a bra.

During cross-examination, Andrew explained that he had called 911 two other times on the day of the incident. First, in the early morning, he had called 911 to report that a suspicious man was standing across the street, and someone had thrown rocks at the security cameras and at his mother's

car. In the past, Andrew had seen a "large man" speaking with appellant while inspecting the Guytons' security cameras, and he had overheard the "large man" threatening to rob the Guytons and "get us when we least expect it."[2] Second, on the night of the September 6 incident, following appellant's arrest, appellant's family members had threatened Andrew and his mother for sending appellant to jail, and Andrew had again called 911.[3] Andrew acknowledged that he had a hard time recalling the exact timing and sequence of events.

Andrew testified he did not instigate the verbal altercation with appellant, did not threaten appellant and was not verbally aggressive with her. He denied that appellant had threatened to call the police on him during the incident, or that the reason he called the police that day was to avoid his own arrest.

In October 2017, about a month before trial, Andrew called the police on another neighbor, Irene Wright. Andrew testified that a group of Wright's family members had threatened Andrew with a baseball bat and knife in retaliation for having sent appellant to jail.

2. *Diane Guyton*

Diane's testimony corroborated Andrew's account of the September 6 altercation with appellant. She observed appellant holding a gun and threatening to kill Diane and her family. Diane did not observe Andrew

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[2] Video footage later played for the jury from August 2017 showed appellant and a man crossing the Guytons' property to inspect the camera system. Andrew identified the man on the video as the one who had threatened to "get us when we least expect." At trial, Andrew identified Weilyn Wingfield from the audience as the "large man" in the video footage.

[3] Video footage later played for the jury from the night of September 6 showed appellant's family members approaching Diane as she tried to get into her car, with Andrew rushing to her side to protect her. Andrew identified appellant's sister, Tiffany Austin, her cousin, Ebone Allen, and Evelyn Franklin as three of the individuals in that encounter. The video showed Allen pointing at Andrew and touching Diane's car. As Andrew explained, the women were "in my mom's face saying that she better get the fuck out of here, because we got [appellant] arrested . . . ." Andrew tried to pick up Diane because he thought the women might hit her.

threatening appellant, nor did she at any point hear appellant say she would call the police.

While there was no video footage of the September 6 incident, video clips from less than three weeks earlier on August 17, 2017 showed appellant calling Diane "ugly bitch," challenging Andrew to come outside, and telling Andrew "I've got somebody for you, little n----!" Minutes later, a "large man" appeared on the video crossing the Guytons' property to inspect their cameras. Diane estimated she had 25 to 30 previous verbal altercations with appellant before the September 6 incident.

Diane recalled an incident between neighbor Irene Wright and Andrew in October that began with a dispute about Wright's dog. Wright's family members had threatened Andrew with a baseball bat, and the police were called to the scene.

3. Aleah Guyton

Aleah was 15 years old at the time of trial. On September 6, she witnessed appellant calling the family derogatory names and challenging Andrew to fight, then saw appellant go into her house and emerge with something small and black in her hand. Aleah could not see if the object was a gun. Aleah did not hear appellant expressly threaten to kill anyone, but she heard appellant say "she got somebody for my brother and stuff like that. And she's going to have some people come jump him."

B. Defense Evidence

The defense presented no witnesses to the September 6 incident that formed the basis for the charges. Ebone Allen, appellant's cousin, denied making threats against Andrew or Diane on the night of September 6, following appellant's arrest. When shown video footage of three women, including herself, approaching Diane, Allen explained that Diane had approached them first. Allen could not recall what the women said to Diane that night. Tiffany Austin, appellant's sister, also acknowledged approaching Andrew and Diane, but denied making threats against them.

Desire Jefferson, Irene Wright's daughter-in-law, testified regarding the October incident. Wright had told Jefferson that the neighbors were harassing her, and Jefferson visited Wright with her four children and two

cousins that day. Jefferson denied making threats against the Guytons, and testified that she told them only to stop harassing her mother-in-law. Jefferson was pulled over by the police as she was driving away, but had no bats, guns or knives, and she was not arrested or searched.

Weilyn Wingfield, appellant's nephew, testified that he had been to appellant's home only once to drop her off and, contrary to Andrew's in-court identification, he was not the person in the video inspecting the security cameras.

C. Andrew's Probationary Status

During Andrew's cross-examination, defense counsel asked: "Is it fair to say you didn't want the police at your house because you were on probation; isn't that true?" Andrew answered: "I've never been on probation. I'm not on probation, so I don't know what you are referring to."

The prosecution objected, and a sidebar discussion ensued. Defense counsel argued that evidence of Andrew's misdemeanor battery conviction was relevant to support the defense theory that Andrew called police preemptively to avoid arrest for threatening appellant first. Andrew's alleged fear of arrest, counsel asserted, was borne out by the fact that he was initially placed in handcuffs when police arrived, and would have provided him a motive to lie, calling his credibility into question.

Applying Evidence Code section 352, the court ruled it would exclude the evidence for impeachment, unless the defense could substantiate its theory that appellant had threatened to call the police first; otherwise, the defense theory was mere "speculation," and evidence of Andrew's probationary status was "just dirtying up the victim."

During Diane's testimony, defense counsel asked if she was aware her son was on probation; she answered, "I don't know nothing about that."

At the conclusion of the defense case, defense counsel renewed his motion to admit evidence of Andrew's probationary status, either through cross-examination or admission of a certified minute order, pursuant to appellant's Sixth Amendment right to effective confrontation and cross-examination. Defense counsel argued "[t]his is a witness credibility case," and Andrew had answered a question falsely which the defense could

contradict for impeachment. As for relevance, defense counsel argued that Andrew was "a potential suspect in criminal activity and his statements going forward, arguably, are to reduce the likelihood that he's going to be taken into custody" and avoid repercussions for making a false statement. The court exercised its discretion under Evidence Code section 352 and denied the motion, finding evidence of Andrew's probationary status not "all that relevant or important for purposes of establishing this particular witness'[s] credibility on the issue." The court observed that if the defense theory were true, Andrew would still expose himself to a probation violation by lying during the 911 call.

D. Closing Arguments

During closing arguments, defense counsel sought to discredit the prosecution witnesses. In particular, the defense highlighted inconsistencies in Andrew's memory of the events, and pointed out that despite his various accusations against others, all of them denied making any threats, and no arrests were made. Also, no video of the actual incident existed, though Andrew had at one point testified that appellant was captured on camera during the altercation. The prosecution acknowledged the inconsistencies in Andrew's testimony, but emphasized that on the essential elements of the crime, his testimony was consistent with his earlier statements to police and during the preliminary hearing, and corroborated Diane's and Aleah's testimony. The prosecution also argued that Aleah's testimony alone was sufficient to support the criminal threat charges.

E. Verdict and Sentencing

The jury found appellant guilty of the criminal threat charges, but found the firearm allegations not true. The court dismissed the strike and reduced one conviction to a misdemeanor. The court sentenced appellant to a total term of nine years, consisting of the high term of three years for the felony, five years for the prior serious felony, and 364 days for the misdemeanor. The court suspended execution of the sentence and placed appellant on five years probation, conditioned on appellant's serving 729 days in county jail.

DISCUSSION

I. The Court Did Not Abuse Its Discretion Excluding Evidence of Andrew's Probationary Status.

A. Governing Principles

Appellant relies primarily on *Davis v. Alaska* (1974) 415 U.S. 308 (*Davis*) to support her argument that the trial court committed error by excluding evidence of Andrew's probationary status for impeachment of Andrew's and Diane's credibility. In *Davis*, the defendant was charged with larceny and burglary. The crucial prosecution witness – who identified the defendant from a photospread and at trial – was on probation for a juvenile adjudication of burglary. On cross-examination, the defense sought to elicit the witness's probationary status, positing that he might have feared being a suspect himself or felt pressured by the police to identify a suspect under fear of possible probation revocation. (*Id.* at pp. 310-311.) The trial court, recognizing the witness's "vulnerable status" as a probationer, prohibited the defense from inquiring as to his probationary status. (*Id.* at p. 318.) During his testimony, the witness denied he had ever been questioned by any law enforcement officers. (*Id.* at p. 313.)

The United States Supreme Court held that the state's interest in protecting the anonymity of juvenile offenders was outweighed by a defendant's Sixth Amendment right to cross-examine his accusers. (*Davis, supra*, 415 U.S. at p. 319.) Subject to the trial court's broad discretion to preclude repetitive and unduly harassing questioning, the Supreme Court concluded the defendant had a right to cross-examine the prosecution witness about his probationary status "to show the existence of possible bias and prejudice," which could have affected his identification of the defendant due to undue pressure from the police, or to shift suspicion away from himself. (*Davis*, *supra*, at p. 317.) *Davis* noted that jurors were "entitled to have the benefit of the defense theory before them" in weighing the witness's testimony, "which provided 'a crucial link in the proof . . . of [the defendant's] act.' [Citation.] The accuracy and truthfulness of [the witness's] testimony were key elements in the State's case against [the defendant]." (*Id.* at p. 317.)

In *People v. Harris* (1989) 47 Cal.3d 1047, the California Supreme Court held that *Davis* did not restrict a trial court's exercise of discretion under Evidence Code section 352. In the absence of evidence that a witness had been threatened with probation revocation or offered benefits related to probation, "[n]othing in the *Davis* opinion suggests that the court intended to abrogate the power of trial courts to restrict cross-examination, even that by defendants, under well-established principles such as those reflected in Evidence Code section 352 . . . ." (*Id.* at pp. 1090-1091, disapproved on another ground in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10 ["'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant'"]; accord, *People v. Quartermain* (1997) 16 Cal.4th 600, 623 ["notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352"].) Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Furthermore, "[e]xclusion of impeaching evidence on collateral matters which has only slight probative value on the issue of veracity does not infringe on the defendant's right of confrontation. [Citation.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 350.) "[A] matter is 'collateral' if it has no logical bearing on any material, disputed issue. [Citation.] A fact may bear on the credibility of a witness and still be collateral to the case." (*People v. Contreras* (2013) 58 Cal.4th 123, 152; see *People v. Dement* (2011) 53 Cal.4th 1, 50-52 [preventing impeachment of inmate who witnessed prison murder with collateral evidence that he lied in court about a murder he was convicted of many years ago], abrogated on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192; *People v. Harris* (2008) 43 Cal.4th 1269, 1291 [upholding denial of impeachment of prosecution witness with evidence of his dishonesty and "general lack of credibility" during probation, which was

collateral and not sufficiently probative].) To be relevant, evidence must have some "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Thus, unless appellant can show that the excluded cross-examination would have produced a "significantly different impression of [the witness's] credibility," the trial court's exercise of discretion will not violate the Confrontation Clause. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680.)

B. No Abuse of Discretion

Davis did not restrict the trial court's discretion under Evidence Code section 352 to exclude impeachment evidence of Andrew's probationary status. *Davis* is distinguishable in several important ways. Unlike the witness in *Davis,* Andrew was not the key eyewitness to a crime in which identity was crucial. Moreover, his account of appellant's threats was largely corroborated by Diane and Aleah, and video footage from the security cameras captured appellant making similar threats in the past. As the trial court noted, there was no evidence to substantiate the defense theory that Andrew called 911 to report the incident before appellant did in order to deflect attention away from his own purportedly criminal conduct. Nor was there evidence that the police officers who responded to the scene were aware Andrew was on probation or exerted any pressure that might have imperiled his probationary status. All of these circumstances made it less likely, in comparison to *Davis*, that Andrew's probationary status had any relevance to the determination of his credibility.

Accordingly, the trial court had discretion to exclude evidence of Andrew's probationary status on the basis that it was a collateral matter with substantial risk of undue prejudice. The mere fact that a witness is on probation, standing alone, does not inherently make the probationer "'vulnerable'" or show that the witness might be biased. The defendant must make some threshold showing that the proposed subject matter of the impeachment would reveal a possible bias, prejudice or an ulterior motive of the witness. (See *Foster v. Superior Court* (1980) 107 Cal.App.3d 218, 226 [though petitioner was entitled to probe for bias, "some explanation of petitioner's theory of relevance [of witness's detention in juvenile hall], on the issue of credibility, would have been appropriate"].) The excluded cross-

examination on a matter the court deemed "ancillary" did not bear on any material, disputed issue on the case. Although the defense tried to discredit Andrew's testimony, it presented no witness to contradict his account of the September 6 incident involving appellant and no evidence that Andrew threatened appellant. The trial court correctly observed that Andrew's probationary status, if anything, would have discouraged him from making a false 911 call so as to avoid any contact with law enforcement. The trial court committed no error when it rejected the defense theory that Andrew's probationary status made him susceptible to bias or provided an ulterior motive for him to falsely accuse appellant in a fabricated 911 call.

Finally, appellant cannot establish that the excluded cross-examination of Andrew's probationary status would have produced a "significantly different impression" of Andrew's and Diane's credibility. (See *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.) The defense had ample opportunity to cross-examine Andrew's credibility and suggest any bias or motive to lie. The defense was not precluded from attempting to demonstrate that Andrew was unworthy of belief; it was merely precluded from doing so with marginally relevant and potentially prejudicial evidence. Indeed, both parties acknowledged during closing argument that there were inconsistencies in Andrew's testimony and his memory of events. But as the prosecution emphasized, Andrew's testimony regarding the troubled history between the neighbors, appellant's unequivocally threatening remarks, and the fear it instilled in him and his family remained consistent, and corroborated Diane's testimony. Andrew's probationary status and credibility as a witness were not disputed facts that impacted the outcome of the entire action. (See Evid. Code, § 210.) It is unlikely that additional evidence of Andrew's probationary status or dishonesty regarding that status would have significantly altered the jury's perception of him.

Any relationship between Andrew's probationary status and the jury's perception of Diane's credibility was even more attenuated. Andrew did not live with Diane, and regardless of the purported closeness of their relationship, her testimony denying knowledge of Andrew's probationary status was not inherently incredible or evidence of bias. We find no abuse of discretion.

C. Harmless Error

Even had we found error in the trial court's exercise of discretion, we would deem it harmless under any standard. (*People v. Breverman* (1998) 19 Cal.4th 142, 149 [state law evidentiary error reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of reasonable probability of a more favorable result absent the error]; *Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error must be harmless beyond a reasonable doubt].) Factors to be considered include: "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.)

Here, there was no reasonable probability that admission of Andrew's probationary status would have resulted in a more favorable verdict for appellant; for the same reasons, any alleged violation of appellant's Sixth Amendment rights was harmless beyond a reasonable doubt. First, Andrew, Diane and Aleah testified to the threats against Andrew, and evidence of Andrew's probationary status or his dishonesty regarding it did not affect Diane's or Aleah's credibility or raise an inference that they were biased. Aleah's testimony was not seriously challenged, and it alone was sufficient to support appellant's conviction of making criminal threats against Andrew. Second, both Andrew and Diane testified to the threats against Diane. Diane's credibility was not affected by the fact that Andrew was on probation, and her disclaimed knowledge of his status was neither demonstrably false nor evidence of her own bias. The defense called no percipient witnesses to contradict Andrew's, Diane's and Aleah's accounts of appellant's threats against both Andrew and Diane, or to support the defense theory that Andrew falsely accused appellant. The defense witnesses contradicted Diane's and Andrew's accounts only of other confrontations that day not involving appellant. At least one of those incidents was captured on videotape and corroborated Andrew's and Diane's testimony. In light of the overall strength of the prosecution's case, the cross-examination otherwise permitted, the evidence corroborating the prosecution witnesses' accounts,

and the absence of any evidence contradicting the alleged criminal threats by appellant, any error in excluding the evidence of Andrew's probationary status or his testimony regarding it was harmless.

II. Remand is Appropriate Under SB 1393.

Under the previous version of section 1385, subdivision (b), a court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" under section 667, subdivision (a), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." On September 30, 2018, the Governor signed SB 1393, which became effective January 1, 2019, and amended section 1385, subdivision (b), to allow a court to exercise its discretion whether to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The trial court here indicated it would have stricken appellant's prior serious felony conviction had it had the discretion to do so. Furthermore, respondent concedes that SB 1393 applies retroactively to appellant's judgment, which was not yet final as of January 1, 2019. (*In re Estrada* (1965) 63 Cal.2d 740, 744 ["If the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies."].) Thus, remand is appropriate to permit the trial court to exercise its discretion to strike the prior serious felony enhancement.

DISPOSITION

The matter is remanded for the trial court to consider whether

appellant's prior serious felony enhancement should be stricken pursuant to SB 1393. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.